

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DEON KENNEDY,

Plaintiff,

Case No. 17-CV-14206

v.

HON. GEORGE CARAM STEEH
HON. R. STEVEN WHALEN

COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

_____ /

ORDER ACCEPTING REPORT AND RECOMMENDATION (Doc. 20),
OVERRULING PLAINTIFF'S OBJECTIONS (Doc. 21),
DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT (Doc. 15), AND GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT (Doc. 18)

On January 15, 2019, Magistrate Judge R. Steven Whalen issued a report and recommendation proposing that the court grant Defendant's motion for summary judgment and deny Plaintiff's motion for summary judgment.

With respect to reports and recommendations from magistrate judges, this court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). The court "may accept, reject

or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” *Id.* Plaintiff filed timely objections which this court has duly considered.

The Administrative Law Judge (“ALJ”) found that Plaintiff retained the residual functional capacity (“RFC”) to perform sedentary work with additional limitations, including the requirement that he could sit for six hours in an eight-hour work day, and stand or walk for two hours, with the additional restriction that he not sit or stand/walk for more than 15-minutes at a time. Plaintiff argues it is impossible for him to perform work under these restrictions as the only possible way to satisfy them is for him to sit for exactly 15-minutes and to stand for exactly five-minutes throughout the entire eight-hour work day. Plaintiff made this same argument to the Magistrate Judge; thus, this court rejects the Commissioner’s argument that Plaintiff did not make this argument in his principal brief. See Doc. 15 at PgID 798, Doc. 19 at PgID 820-824.

But Plaintiff failed to cross-examine the vocational expert (“VE”) at the administrative hearing, thus forfeiting any implied argument that the ALJ’s reliance on the VE’s determination that he could perform sedentary work was unfounded. See *Kepke v. Comm’r of Soc. Sec.*, 636 F. App’x 625, 636 (6th Cir. 2016) (because plaintiff failed to probe alleged deficiency in

specifics of RFC at the ALJ hearing, she forfeited the argument); *Sims v. Comm’r of Soc. Sec.*, 406 F. App’x 977, 982 (6th Cir. 2011) (“Yes, the vocational expert’s testimony could have been further refined; but as the district court pointed out, plaintiff’s counsel had the opportunity to cross-examine, but asked only one question and did not probe the deficiency now identified on appeal.”)

Even if Plaintiff did not forfeit the argument, Plaintiff’s argument lacks merit. Contrary to Plaintiff’s allegation, there was more than one way for Plaintiff to alter between sitting and standing given his RFC. True, the most he could sit or stand/walk at one time was 15-minutes, but contrary to Plaintiff’s argument, nothing required him to sit for exactly 15-minute intervals.¹ He could stand up or walk after eight minutes, for example, and then stand/walk for any duration less than 15-minutes, say for example, for as little as two minutes. As the Magistrate Judge correctly noted, “The RFC cannot be read to require him to stand or walk for 15 minutes with every position change, but instead, precludes him from standing/walking for *more* than a 15-minute interval at any time over the course of the work period.” (Doc. 20 at PgID 835-36).

¹ The RFC provides: “Can sit with normal breaks for a total of six hours in an eight hour workday. Could do so for only 15 minutes at one time.” (Tr. 41-42).

Upon review of the report and recommendation, Plaintiff's objections, and the Commissioner's response, the court agrees with Magistrate Judge Whalen's analysis and conclusions.

Therefore, IT IS ORDERED that Magistrate Judge Whalen's report and recommendation (Doc. 20) is ACCEPTED and ADOPTED as the order of the court.

IT IS FURTHER ORDERED that Plaintiff's objections (Doc. 21) are OVERRULED, Plaintiff's motion for summary judgment (Doc. 15) is DENIED and Defendant's motion for summary judgment (Doc. 18) is GRANTED.

IT IS SO ORDERED.

Dated: February 5, 2019

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE